IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1621

RICHARD RAY CLAYTON,

Petitioner,

vs.

JAMES R. RUSSO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

TOPICAL INDEX

Page

PRELIMINARY STATEMENT 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENT

I BECAUSE RESPONDENTS' AFFIDAVIT WAS CONSIDERED BY THE COURT AND CONTAINED MATTERS NOT SET FORTH IN THE COMPLAINT, THE DISTRICT COURT COULD PROPERLY TREAT THE MOTION TO DISMISS AS ONE FOR SUMMARY JUDGMENT 4

II PETITIONER HAD ADEQUATE NOTICE AND OPPORTUNITY TO BE HEARD PRIOR TO THE TRIAL COURT'S DECISION TO TREAT THE MOTION TO DISMISS AS ONE FOR SUMMARY JUDGMENT 5

III PETITIONER'S REPRESENTATION OF HIMSELF IS NOT REASON FOR THIS COURT TO TAKE COGNIZANCE OF THIS CASE 8

CONCLUSION 11

LIST OF AUTHORITIES CITED

Cases

Page

Consolidated Jewelers, Inc. v. Standard Financial Corp. (6th Cir., 1963) 325 F.2d 31, 36 5

International Longshoremen's and Warehousemen's U. v. Kuntz (9th Cir., 1964) 334 F.2d 165 10

Sheaf v. Minneapolis, St. P. & S.S.M.R. Co. (8th Cir., 1947) 162 F.2d 110, 113 5

Statutes

Title 28, United States Code, Section 1254(1) 2

Federal Civil Rights Statutes, 42 United States Code, Sections 1981, 1983 and 1985 ..... 2, 3, 4

Constitutions

Constitution of the United States, Amendment XIV 3

Other Authorities

Federal Rules of Civil Procedure, Rule 12 ..... 3, 5

Rule 12(b) 3, 5, 6

Rule 12(b)(6) 3, 4, 6

Rule 56 ..... 5, 6

Rules of the Supreme Court, Rule 19(b) 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1624

RICHARD RAY CLAYTOR,
Petitioner,

v.

JAMES R. RUNGE, et. al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

Petitioner seeks a Writ of Certiorari to review an order of the United States Court of Appeals for the Ninth Circuit (No. 72-2126) dated October 26, 1972 affirming the judgment of the District Court. A copy of the judgment dated June 15, 1972 (page 10 of the Petition) and a copy of the Order of Affirmance dated October 26, 1972 of the United States Court of Appeals

for the Ninth Circuit (page 12 of the Petition) are attached to the Petition for Writ of Certiorari which was filed in this Court on June 4, 1973.

JURISDICTION

The Petition states that jurisdiction in this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

The Petition sets forth the following questions (phraseology is that of the Petitioner):

"1) Whether it was error and an abuse of discretion for the District Judge to convert respondents' motion to dismiss into one for summary judgment on the merits without notice to either or both parties.

"2) Whether notice of the conversion, which took place at the end of the hearing on respondents' motion to dismiss, was adequate notice for a pro se party.

"3) Whether due process is denied a pro se party by conversion to a summary judgment without notice.

"4) Whether District Judge erred in granting a summary judgment on the merits, and not as a matter of law, against petitioner who sought damages, injunctive relief, and declaratory judgment, under 28 U.S.C. §§ 1343, 2201, and 2202; 42 U.S.C. §§ 1981, 1983, and 1985; and the due process and equal protection clauses of the Fourteenth Amendment.

"5) Whether it is error to deny trial when there is a genuine dispute of facts, but the pro se complaint is not verified."

STATEMENT OF THE CASE

The "Amended Complaint" (which was the only complaint served upon Respondents) alleged that the daughter of the

Petitioner was improperly transferred from one of the elementary schools of the La Mesa-Spring Valley School District of San Diego County, California to a new school in the District and that she had thus been discriminated against because "she was the only girl being transferred from her *classroom*. . . ." Other allegations in the Complaint included assertions that the new school to which the pupil had been transferred was a "communist" school, was "improperly administered" so as to "limit the ability of each and every student", was "substandard", and that Petitioner's daughter was denied various constitutional rights including "the right or the privilege to remain at [the former school] and graduate with her *classroom*", "equal educational opportunities" with other children of the district, and "the right to be educated in a non-communist school".

Jurisdiction of the District Court to decide the interests of the Petitioner was allegedly based upon the Federal Civil Rights Statutes, 42 U.S.C. Sections 1981, 1983 and 1985, and the due process and equal protection of the law clauses of the Fourteenth Amendment to the United States Constitution.

Respondents filed a motion to dismiss the action pursuant to Rule 12(b) Federal Rules of Civil Procedure, defense numbered 1 ("lack of jurisdiction over the subject matter") and defense numbered 6 ("to dismiss for failure of the pleading to state a claim upon which relief can be granted"). The bases for asserting lack of jurisdiction under defense numbered 1 of Rule 12(b) were that the alleged federal questions were "frivolous and unsubstantial" and that it appeared on the face of the amended complaint that the alleged claims do not arise under the Constitution, laws or treaties of the United States. The United States District Court Southern District of California, the Honorable

Gordon Thompson, Jr., Judge Presiding, treated the motion to dismiss under defense numbered 6 of Rule 12(b) ("to dismiss for failure of the pleading to state a claim upon which relief can be granted") as a motion for summary judgment because the court took into consideration the affidavit of one of the Respondents which set forth facts contradicting the allegations in the complaint. The District Court granted the motion as one for a summary judgment on behalf of the Respondents and against the Petitioner.

ARGUMENT

I

BECAUSE RESPONDENTS' AFFIDAVIT WAS CONSIDERED BY THE COURT AND CONTAINED MATTERS NOT SET FORTH IN THE COMPLAINT, THE DISTRICT COURT COULD PROPERLY TREAT THE MOTION TO DISMISS AS ONE FOR SUMMARY JUDGMENT.

The "Amended Complaint" contained various conclusions and opinions of the pleader relating to asserted violations of the Civil Rights Act (42 U.S.C., §§ 1981, 1983 and 1985), but as it contained few pertinent substantive facts Respondents filed an affidavit of one of them to advise the court of the essential facts concerning the school to which the Petitioner's daughter had been assigned, the reasons for the assignment (because plaintiff and her parents lived in the attendance area of the new school), and the nature of the educational process carried on there ("curriculum and courses of study at the [new school] are similar and comparable to the curriculum and courses of study used at all elementary schools of this district", etc.). The District Court stated that although it had "some real reservations" about the

complaint, there were some allegations that "could be construed as sufficient to, theoretically maybe, bring the plaintiff within the Federal Civil Rights Act, although I doubt it." The court in arriving at its decision took into consideration the Respondents' affidavit and thus determined to treat the motion to dismiss as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The court then granted the motion for summary judgment after stating that "there is a lack of a showing of a violation of any civil rights" and that "there is no question but what there has been no discrimination insofar as this young lady is concerned". This action of the court is specifically authorized by Rule 12(b) of the Federal Rules of Civil Procedure and has been confirmed numerous times in court decisions (*Consolidated Jewelers, Inc.* v. *Standard Financial Corp.* [6th Cir., 1963] 325 F.2d 31, 36). Inasmuch as the affidavit submitted included statements of fact outside the pleadings and as these matters were considered by the court it was entirely proper for the District Court to treat the motion to dismiss as one for summary judgment. (*Sheaf* v. *Minneapolis, St. P. & S.S.M.R. Co.* [8th Cir., 1947] 162 F.2d 110, 113, citing Federal Rules of Civil Procedure, 12 and 56).

II

PETITIONER HAD ADEQUATE NOTICE AND OPPORTUNITY TO BE HEARD PRIOR TO THE TRIAL COURT'S DECISION TO TREAT THE MOTION TO DISMISS AS ONE FOR SUMMARY JUDGMENT.

Petitioner contends that he was not afforded adequate notice of the possibility that the trial court might treat the motion to dismiss as one for summary judgment. However, Respondents'

notice and motion to dismiss together with the affidavit of one of the Respondents was served on Petitioner more than 14 days in advance of the hearing date first designated thus giving him substantially more notice than is required for a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Furthermore, Rule 12(b) of the Federal Rules of Civil Procedure provides in part as follows:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to or not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion under Rule 56."

Thus, by the language of the statute which was the specific basis for Respondents' motion to dismiss, Petitioner knew or should have known the court's powers and duties with regard to disposition of the motion. Furthermore, after Respondents' notice of motion and motion to dismiss (together with the affidavit of one of the Respondents) were served on Petitioner on May 1, 1972, with a designated hearing date of May 15, 1972, Petitioner requested and obtained Respondents' stipulation to continue the date of the hearing to May 22, 1972 in order "to allow plaintiff an additional seven days in which to file the required papers opposing defendants' motion". Thus Petitioner was afforded more than three weeks in which to consider the motion and to prepare himself for the hearing and his points and authorities and argument in opposition to the motion showed clearly that he, even though he was a non-lawyer and was representing himself, was in fact fully aware of Rule 12(b)(6) and that the court must

treat a motion to dismiss as one for summary judgment when matters outside the pleadings are presented to the court and not excluded. Petitioner's knowledge of this matter is clearly shown by his statements in subparagraphs 1(e) and (f) of his points and authorities (on pages 43 and 44 of the Record on Appeal to the Court of Appeal). In paragraph 1(e) he stated in part as follows:

> "Typically, the only information necessary for a decision on the motion is to be found in the pleading itself; if outside evidence is considered the motion becomes one for summary judgment."

In paragraph 1(f) of his points and authorities he stated as follows:

> "Where, at a hearing on motion to dismiss, which was based in part on asserted failure to state claim upon which relief could be granted, matters outside pleadings were presented and not excluded by court, court was required to treat motion to dismiss as one for summary judgment and to dispose of it as provided by Rule."

In paragraph 6 of his points and authorities (page 45 of the Record on Appeal) Petitioner made the following statement:

> "(6) Plaintiff suggests that by submitting the affidavit of defendant Gerstein, and by the language of their motion, defendants have converted their motion to dismiss into a motion for summary judgment. Should the court consider this motion as one for summary judgment, plaintiff believes it can be said that the same instructions or mandates apply as presented in paragraphs one and two above."

By these statements in his points and authorities submitted to the trial court in opposition to Respondents' motion to dismiss, it is clearly demonstrated that Petitioner had ample notice and knowl-

edge of the provision in Rule 12(b) of the Federal Rules of Civil Procedure requiring the court to treat a motion to dismiss as one for summary judgment if it considers matters outside the pleadings; his own statement shows that he not only knew that the court might well do this because of the submission of the affidavit of one of the Respondents but in fact he urged that the motion to dismiss had already been "converted" into motion for summary judgment and he followed that statement with an argument with relation to the burden of proof and inferences applicable in connection with a motion for summary judgment. Thus Petitioner is not now in a position to complain that he had inadequate knowledge, notice, or opportunity to submit materials to the court to refute the facts set forth in Respondents' affidavit and since those are the basic questions involved in this Petition there is no valid reason for this Court to exercise its discretion to entertain a review of the matter.

III

PETITIONER'S REPRESENTATION OF HIMSELF IS NOT REASON FOR THIS COURT TO TAKE COGNIZANCE OF THIS CASE.

In his statement of "Questions Presented" on page two of the Petition, Petitioner stresses that he was a "pro se party" thus intimating that he is entitled to greater consideration of his activities and assertions simply because he is a non-lawyer representing himself and did not choose to seek the assistance of counsel. It will be noted, however, that although the Petitioner has represented himself throughout, he was not proceeding *in forma pauperis* and he is not entitled to greater consideration with respect to his actions or the effect and interpretation of

his pleadings and arguments than other parties. Although it might be that the allegations of a "pro se" complaint will not be viewed as technically as one drafted by a lawyer, this does not mean that the usual requirements of pleadings are to be dispensed with or that the trial court must act differently than in other cases. As a matter of fact it is clear from the remarks of the District Court that the court did in fact give more than usual consideration to the allegations of the complaint, because the court expressed "doubt" as to whether the complaint even contained allegations to assert a claim under the Civil Rights Act. The words of the trial court at the hearing in this regard as set forth in the reporter's transcript were as follows:

> "While the court has some reservation as to whether or not it has the subject matter of jurisdiction under Rule 12(b)(1), on the basis of the lack of a Federal question presented, and whether or not the claim is, in fact, insubstantial or frivolous, it seems to the Court that it would be more appropriately decided on the basis of a motion for summary judgment.
>
> "First, as I have indicated, because of the affidavit filed by the defendants in this case, and secondly, because there are perhaps some allegations that could be construed as sufficient to, theoretically maybe, bring the plaintiff within the Federal Civil Rights Act, although I doubt it. As I say, I have some real reservations with regard to the motion—I mean, to the pleadings to the complaint. By considering the—and when I say there are some statements that could conceivably bring—although the allegations are vague—could conceivably bring the plaintiff within the Federal Civil Rights Act; such as the fact that the daughter alleges that she felt that she was invidiously discriminated against, and although this is the subject matter, feelings of the daughter, it is possible that such could be construed to come within some sort of civil rights' violation."

As is true in any case (whether the complaint is "pro se" or otherwise) where the defendants file affidavits with a motion to

dismiss and the trial court treats it as a motion for summary judgment, the burden is placed upon the plaintiff to disclose the merits of his case and his failure to do so ends his entitlement to liberal construction of his pleadings (*International Longshoremen's and Warehousemen's U.* v. *Kuntz* [9th Cir., 1964] 334 F.2d 165). Although Petitioner stresses the fact that he is representing himself without the advice of counsel, this was a matter of his own choosing and he concedes that he cannot qualify to proceed *in forma pauperis*. Furthermore the nature and extent of his pleadings, which include extensive citations of statutes and decisions as well as voluminous arguments of a legal nature, indicate that although he is not an attorney at law he was knowledgeable of legal proceedings more than might be expected of non-lawyers and cannot claim that he was ignorant of the manner in which the trial court must proceed in matters of this nature.

CONCLUSION

As has been demonstrated, the trial court gave full and adequate consideration to the allegations of the "Amended Complaint" and it is clearly evident that Petitioner had adequate notice and was well aware of the requirement for the trial court to treat the motion to dismiss as one for summary judgment if Respondents' affidavit was considered; in fact a substantial proportion of his points and authorities and arguments filed with that court were based on the assumption that the court would act as it did. The "Questions Presented" in the Petition were fully considered by the Ninth Circuit Court of Appeals and its Order of Affirmance should conclude the matter. There is no indication that the criteria set forth in Rule 19(b) of the Rules of the Supreme Court are applicable to justify this court's consideration of the case. Therefore Respondents respectfully urge that this honorable court deny the Petition sought herein.

DATED: October 1, 1973

Respectfully submitted,

ROBERT G. BERREY, County Counsel

By ROBERT B. HUTCHINS, Deputy
302 County Administration Center
1600 Pacific Highway
San Diego, California 92101

Attorneys for Respondents